

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

JIMMIE BROXTON,

Defendant-Appellant.

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UNPUBLISHED

January 31, 2006

No. 258335

Wayne Circuit Court

LC No. 04-006544

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of two to six years for the marijuana conviction, and two to seven years for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

On May 12, 2004, Deputy Michael Knox and Officer Troy Debets, who were both members of the Detroit Police Department's felony apprehension team, were looking for defendant. While driving, they passed defendant, who was alone in a gray Buick Regal automobile traveling in the opposite direction. Officer Debets made a u-turn and followed defendant into a restaurant parking lot. Defendant parked the Buick, exited and approached the officers, and was arrested. Deputy Knox entered the license plate number of the Buick into his computer to check its registration. No record was found. He then went to the vehicle to obtain its vehicle identification number. While looking into the vehicle, he saw the handle and slide of a handgun sticking out from underneath the front, passenger seat. Deputy Knox entered the vehicle and secured the weapon. During a subsequent inventory search of the vehicle, Deputy Knox found a backpack containing 95.96 grams of marijuana, two scales, and a box of sandwich baggies. Cash, in the amount of \$580, was recovered from defendant. The Buick did not belong to defendant. The police later confirmed that it belonged to another member of his family. At trial, the parties stipulated that defendant was ineligible to carry a firearm because he had a prior conviction.

Defense counsel defended the charges by eliciting testimony from Deputy Knox and Officer Debets regarding their failures with respect to their investigation. Neither officer preserved the weapon or the contents of the backpack for fingerprints, and neither requested that

the items be fingerprinted to determine ownership. Defense counsel emphasized that nothing in the record demonstrated that defendant owned the weapon or backpack. Further, defense counsel elicited testimony that defendant did not flee or try to hide from the officers. Rather, he immediately approached them when he was followed.

On appeal, defendant first argues that trial counsel was ineffective for several reasons. Our review of defendant's claims of ineffective assistance of counsel is limited to errors apparent on the record because no *Ginther*<sup>1</sup> hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

At the beginning of jury selection, the trial court read the charges to the jury venire, stating in relevant part:

The information in this case charges the defendant Jimmie Broxton with, on Count I, possession of a firearm by a felon; charges that he did transport a firearm when ineligible to do so, because he had been convicted of delivery of controlled substance, a felony, punishable by imprisonment of four years or more, and requirement for regaining eligibility had not been met.

Neither defense counsel nor the prosecutor objected to the trial court's statement. Jury selection thereafter commenced. No comments were made about defendant's prior felony conviction during the remainder of the jury voir dire. The prospective jurors were questioned about their ability to be fair and impartial, about the presumption of innocence and the legal requirement that a defendant be presumed innocent unless and until the prosecutor proves each element of the charged crime, and about their ability to follow given instructions, including instructions related to the prosecutor's burden of proof and the elements of the crimes. During trial, no reference was made about defendant's prior conviction, except when a generic stipulation was read to the jury, indicating that defendant was convicted of a prior felony and was ineligible to possess a firearm.

Defendant's first argument is that counsel was ineffective for both failing to object to the trial court's reading of the charges to include the nature of his prior conviction and failing to request a curative instruction. He argues that the members of the jury must have been left with the indelible impression that defendant was facing the same charge for which he was previously convicted and that he had already served four years in prison. We agree with defendant that the trial court erred by informing the jury venire about the nature of defendant's past conviction. In *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998), this Court recognized that

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

evidence of a prior felony can be prejudicial at a trial where the defendant is charged with both being a felon in possession of a firearm and other charges. In order to prove a felon-in-possession charge, the prosecutor must prove that the defendant was convicted of a prior felony. *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999). The *Green* Court outlined safeguards that can be utilized to ensure that a defendant suffers no unfair prejudice in a single trial where he faces both a felon-in-possession charge and other charges. Specifically, the prior conviction can be introduced by a simple stipulation that defendant had a prior conviction, a limiting instruction can be given to emphasize that the jury must give separate consideration to each count, and a specific instruction can be given to the jury to consider the prior conviction only as it relates to the felon-in-possession charge. *Green, supra*. Here, the parties agreed to a generic stipulation at trial. Yet, the trial court informed the potential jurors of the exact nature of the underlying felony. This was error.

We cannot conclude, however, that defense counsel's failure to either object or request a curative instruction fell below an objective standard of reasonableness. If trial counsel had objected, he would have drawn attention to the information provided by the trial court. This would have heightened the impact of the statement on the potential jurors. Counsel may well have decided not to highlight the improper information in front of the venire as a matter of strategy. Defendant has not overcome the presumption of sound trial strategy. More importantly, even if we concluded that trial counsel's failure to object was objectively unreasonable, defendant cannot meet his burden of demonstrating that, but for counsel's performance, the result of the proceeding would have been different. The record does not support defendant's conclusion that the jury was biased. Defendant's prior conviction for delivery of a controlled substance was not the same as his current charge of possession with intent to deliver marijuana. More importantly, the jury was instructed, both before opening statements and after closing arguments, that the case had to be decided on the basis of the evidence. The jurors were informed that the "evidence" included only sworn witness testimony, admitted exhibits, and anything else the judge designated as evidence. The jurors were also instructed before deliberation that the trial court's comments were not evidence. "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Given the substantial evidence against defendant, the fact that his past conviction and present charges were not identical, and the trial court's instructions, we conclude that defendant has not met his burden of proving that defense counsel was ineffective for failing to object and request a curative instruction following the trial court's reading of the charges.

Defendant also argues that counsel was ineffective for failing to file a pretrial motion before the trial court to insure that the jury would not hear about the nature of his prior felony conviction. Again, we disagree. Defense counsel and the prosecutor agreed to a stipulation on the issue of defendant's past conviction, which is the exact issue that defendant now claims should have been the subject of a motion in limine. Because the matter was settled by the parties' stipulation, a motion was unnecessary. Further, nothing in the record reveals that defense counsel should have anticipated that the trial court would inadvertently inform the jury venire of the nature of the prior felony at the start of jury selection. Therefore, counsel's failure to file a motion in limine was not objectively unreasonable. Thus, defendant's claim must fail. *Stanaway, supra*.

Defendant additionally argues that trial counsel was ineffective for failing to call Terrell Valentine as a witness for the defense. Defendant asserts that he was not alone in the automobile when the officers followed him into the restaurant parking lot on May 12, 2004. He argues that counsel knew that Valentine was also in the vehicle and that Valentine could have been called as a witness to support the defense position that the police officers were not credible. Moreover, defendant claims that Valentine would have supported his theory that the contraband in the vehicle did not belong to defendant. This issue is without merit. First, the issue is waived. At trial, defendant himself affirmatively agreed on the record that he did not wish to call Valentine as a witness. In *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), the Court ruled that appellate review may not be sought by a party who abandons or intentionally relinquishes his rights. Second, decisions regarding what evidence to present are matters of trial strategy, and this Court does not substitute its judgment for that of counsel with respect to such matters. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). On the record before us, we cannot conclude that the failure to call Valentine was objectively unreasonable. Deputy Knox and Officer Debets both testified that there was no one else in defendant's automobile. Defense counsel was clearly aware of defendant's claims regarding Valentine, but made a strategic decision, on the record, not to call Valentine. Defense counsel may have had concerns about Valentine's testimony.

Moreover, we note that nothing in the record demonstrates that Valentine's testimony would have supported the trial defenses. It is incumbent upon a defendant to establish the factual predicate for his claim of ineffective assistance of counsel, and if a defendant's claim relies on facts not of record, he must make a testimonial record at the trial court level to support his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant relies only on his unsubstantiated statements regarding Valentine's proposed testimony. He has not met his burden of demonstrating that his counsel was ineffective, and we will not second-guess counsel's decision to refrain from calling Valentine as a witness.

We also decline defendant's request to remand for an evidentiary hearing on his claim of ineffective assistance of counsel. The request is untimely and is not supported by an appropriate offer of proof. See MCR 7.211(C)(1).

Finally, separate and apart from his claims of ineffective assistance of counsel, defendant argues that the trial court denied him a fair trial by divulging the nature of his prior conviction to the prospective jurors. Because defendant did not preserve this issue with an appropriate objection at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As previously discussed, the trial court's specific reference to defendant's past crime for delivery of a controlled substance was a clear, obvious error. In order to constitute plain error requiring reversal, however, defendant bears the burden of showing that the plain error affected the outcome of the trial. *Id.* at 763. Even where a defendant can satisfy that latter requirement, reversal is only warranted when the error results in the conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.* at 763-764.

In this case, defendant has not met his burden of showing that the error affected the outcome of the trial. The trial court's improper statement was made before the jury panel was selected and sworn. This case is akin to *Green*, *supra* at 692, where the parties agreed to

stipulate that Green had a prior, unspecified felony conviction, but the trial court informed the prospective jury panel of the specific nature of the prior conviction before jury selection. This Court found no error requiring reversal where the trial court's remark was isolated and the trial court instructed the jury that the defendants in the case were entitled to a separate determination of the charges against them. *Id.* In this case, the trial court did not instruct the jury that separate consideration must be given to each charge or that the prior conviction should only be considered as it related to the felon-in-possession charge.<sup>2</sup> *Green, supra.* However, when the panel was sworn, the jurors affirmed that they would "justly decide" the questions submitted to them and would render their verdict *only* on the evidence introduced, in accordance with the court's instructions. The jury was instructed both before the parties gave opening statements and after the parties rested their cases that "evidence" included only sworn testimony, exhibits, and anything else that the judge indicated was evidence. The jurors were specifically instructed that the trial court's comments were not evidence. As previously noted, "jurors are presumed to follow their instructions." *Graves, supra.* Defendant cannot meet his burden of demonstrating that his substantial rights were affected. The improper information was provided before the jury was selected, the jury was given numerous instructions related to its decision-making function in the case, the jury swore to decide the case based on the evidence, and there was substantial evidence against defendant. More importantly, there has been no showing that defendant is actually innocent and, under the circumstances, we are not persuaded that the fairness, integrity, or public reputation of the proceedings was seriously affected by the trial court's isolated, ill-advised comment, which was made before the jury was even selected. *Green, supra.*

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey

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<sup>2</sup> Defendant's trial counsel did not request any specific limiting instructions. In arguing his claims on appeal, defendant does not argue that his counsel was ineffective for failing to request the specific prophylactic instructions set out in *Green, supra* at 691-692. We note, however, that counsel's failure in this regard would not require reversal even if defendant made the appropriate argument. See *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997).